SYKT. PERKHIDMATAN BAS SIBUGA SDN. BHD.

v.

SYKT. BAS JALAN LEILA SDN. BHD.

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[CIVIL APPEAL NO: S12-08 OF 1996]
5 MARCH 1997

CIVIL PROCEDURE: *Action - Limitation period - Disposal of action without trial - Striking out - Appeal - Appeal record not filed within time - Commencement of second action - Res judicata - Adjudication, what constitutes - Conditions for application of doctrine - Conditions to be fulfilled - Decision, finality of earlier decision*

The appellants/plaintiffs ('the plaintiffs') took out an action against the respondents/defendants ('the defendants') in the Sessions Court ('the 1st action') alleging negligence of the defendant, their employee, agent or servant resulting in a collision between a vehicle of the plaintiffs and a bus of the defendants.

On the application by the defendants, the said Sessions Court struck out the 1st action on the ground that it was statute-barred ('the 1st decision'). The plaintiffs appealed to the High Court against the 1st decision but the appeal was struck out as the necessary Appeal Record was not filed within the prescribed period.

The plaintiff then refiled a fresh action against the defendants ('the 2nd action') in the Sessions Court, which cause of action was identical to the 1st action. Subsequently, the defendants filed an application to strike out the 2nd action and this was allowed by the Sessions Court Judge ('SCJ') ('the 2nd decision'). The SCJ held that the 1st decision was a final decision and thus the doctrine of *res judicata* applied against the 2nd action.

The present case was an appeal by the appellants/plaintiffs against the decision of the learned SCJ. The main thrust of the appeal was that the doctrine of *res judicata* should not be applied based on the following four reasons:

(a) there was no final judgment in the 1st action as the 1st decision was on a point of law which failed to follow an earlier decision of the High Court in Sarawak on the same point;

(b) the appeal against the 1st decision was struck out on technicality without any decision on the merits;

(c) the 1st decision was *per incuriam* and/or a nullity as it did not follow an earlier decision of the High Court of Sarawak which was binding on the SCJ; and

(d) the 1st decision was a nullity as it was decided on the basis of a limitation period of two years instead of six years, thus the plaintiffs were entitled to refile the 2nd action as the limitation period had not yet expired.

Held:

[1] Save in exceptional cases, the doctrine of *res judicata* would apply where there had been a final decision pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation and that any party or privy to such litigation as against any other party or privy would be estopped in any subsequent litigation from disputing or questioning such decision on the merits.

[2] The three essential elements of the doctrine of *res judicata* are (a) there must exist a final judgment or decision (b) there must be identity of parties including those in privy and (c) there must be an identity of subject matter or issue in the earlier and subsequent litigations and this element is not confined to issues that were brought forward but to include issues which could have been taken up.

[3] In response to ground (a) above, the Court found that the 1st decision of the SCJ striking out the 1st action on the ground of it being statute-barred constitutes a final judgment. As such, the 1st decision had effectively demolished the cause of action of the plaintiffs and the proper course should have been to appeal against the 1st decision rather then to file the 2nd action.

[4] In response to ground (b) above, the Court held that even though an appeal was in fact taken against the 1st decision the appeal was struck out due to the plaintiff's own conduct. The plaintiff then cannot be allowed to recommence another action as they disagreed with the 1st decision. Otherwise there would be nothing to stop a third fresh action instead of appealing if the plaintiff thought an error of law had also been committed when deciding the present case.

[5] In response to ground (c) above, the Court held that a *per incuriam* decision would not be a nullity per se. An aggrieved party is at liberty to appeal to a higher Court against that decision instead of filing a second action.

[6] In response to ground (d) above, the Court held that when a case had been determined, there would be no basis for the aggrieved party to recommence a fresh action solely on the fact that his cause of action was yet to be statute-barred. In a situation like this, the doctrine of *res judicata* would apply in its full rigor in respect of the subsequent action.

Cases referred to:

Government of Malaysia v. Yee Kok Wei & Anor.
Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd. [1995] 3 CLJ 783 ***(refd)***
Government of Malaysia v. Dato' Chong Kok Lim [1973] 2 MLJ 74 ***(refd)***
Hartecon JV Sdn. Bhd. & Anor. v. Hartela Contractors Ltd. [1997] 2 CLJ 104 ***(refd)***
Arnold v. National Westminster Bank [1988] 3 All ER 977 Ch. D ***(refd)***
Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd. & Ors. (No. 2) [1996] 2 All ER 536 ***(refd)***
Henderson v. Henderson [1843-60] All ER 378 ***(refd)***
Kok Hoong v. Leong Cheong Kweng Mines Ltd. [1984] 30 MLJ 49 PC ***(refd)***
Tong Lee Hwa & Anor. v. Lee Yoke San [1979] 1 MLJ 24 FC ***(refd)***
Tio Chee Hing & Ors. v. Government of Sabah [1982] 1 MLJ 138 ***(refd)***
Cassel & Co. Ltd. v. Broome [1972] 1 All ER 801 HL ***(refd)***
United Malayan Banking Corporation Bhd. v. Syarikat Perumahan Luas Sdn. Bhd. (No. 2) [1988] 3 MLJ 352 ***(refd)***

Legislation referred to:

National Land Code, s. 120
Sarawak Limitation Ordinance, Schedule, Items 19, 97

For the appellants - Edwin Tsen; M/s. Tan Pang Tsen & Co.
For the respondents - P.K. Lim; M/s. P.K. Lim & Co.

JUDGMENT

Richard Malanjum J:

Introduction

This is an appeal by the appellants/plaintiffs against the decision of the learned Sessions Court Judge ('SCJ') given on 31 July 1996 allowing the application of the respondents/defendants to strike out the action of the appellants/plaintiffs on the ground of it being 'scandalous, frivolous or vexatious and/or is otherwise an abuse of the process of the Court'.

Learned Counsel for the appellants/plaintiffs submitted six grounds of appeal. In summary, his complaints are centered on the following points, namely:

(i) that the doctrine of *res judicata* was not applicable;

(ii) that there was no mandatory requirement for the appellants/plaintiffs to appeal in their earlier action if the limitation period had not expired;

(iii) that the trial Court was bound by an earlier decision of a higher Court on a similar issue; and

(iv) that since the earlier action of the appellants/plaintiffs was only struck out and not dismissed, it should not preclude them from refiling a fresh action.

Background

To better appreciate the grounds submitted knowledge of the background of this present appeal is necessary.

The appellants/plaintiffs alleged that the respondents/defendants by their employee, agent or servant were negligent resulting in the collision between a vehicle of the appellants/plaintiffs and a bus of the respondents/defendants which occurred on 11 January 1990 along Jalan Cecily, Sandakan, Sabah. Arising therefrom the appellants/plaintiffs took out an action against the respondents/defendants in the Sessions Court, Sandakan under case No. 53-97-1994 ('the 1st action'). On 7 August 1995 on the application by the respondents/defendants the said Court struck out the 1st action with costs basically on the ground that the said action was statute-barred ('the 1st decision'). It was the contention of the respondents/defendants that the limitation period should be two years. Dissatisfied with the 1st decision, the appellants/plaintiffs appealed to the High Court. On 8 December 1995 the High Court struck out the appeal as the necessary Appeal Record was not filed within the prescribed period.

However, despite the out-come of the 1st action the appellants/plaintiffs refiled a fresh action ('the 2nd action') against the respondents/defendants in the Sessions Courts which cause of action was identical to the 1st action. The summons of the 2nd action was dated 18 December 1995 although the statement of claim was dated 13 December 1995. And the case number given was Summons No. 53-06-1995.

Subsequently, on 26 June 1996 the respondents/defendants filed an application to strike out the 2nd action. That was heard and allowed ('the 2nd decision'). Hence this present appeal.

In the 2nd decision the learned SCJ held that the 1st decision was a final decision and thus the doctrine of *res judicata* applied against the 2nd action. He also rejected the notion that the 1st decision was a nullity. And the learned SCJ expressed his view that the 1st decision need not necessarily be wrong. He reasoned that there were Privy Council cases which were not referred to in the High Court case relied upon by the learned Counsel for the appellants/plaintiffs to substantiate his contention as regards the limitation period for the

tort of negligence involving motor vehicles. Finally, the learned SCJ gave no importance to the usage of the phrase/words "struck out" and "dismissed".

The Grounds, Contentions And Findings

(a) The Applicability Of The Doctrine Of Res Judicata

It is the main thrust of this appeal that the doctrine of *res judicata* should not be applied. In their Memorandum of Appeal the appellants/plaintiffs gave four reasons, namely, in summary:

(i) there was no final judgment in the 1st action as the 1st decision was on a point of law which failed to follow an earlier decision of the High Court in Sarawak on the same point;

(ii) the appeal against the 1st decision was struck out on technicality without any decision on the merits;

(iii) the 1st decision was *per incuriam* and/or a nullity as it did not follow an earlier decision of the High Court of Sarawak which was binding on the SCJ. The case referred to is the *Government of Malaysia v. Yee Kok Wei & Anor*. (Kuching Suit No. KG. 268 of 1980) (unreported). There, Tan Chiaw Thong J held that item 19 of the schedule of the Sarawak Limitation Ordinance was not intended to include the tort of negligence in the driving of a motor vehicle. The learned Judge held that the limitation period should fall under item 97 which provided six years to institute an action from the date of the accident; and

(iv) the 1st decision was a nullity as it was decided on the basis of a limitation period of two years instead of six years. Thus, the appellants/plaintiffs were entitled to refile the 2nd action as the limitation period had not yet expired.

Learned Counsel for the respective parties in their submissions gave their opposing views on this ground.

Now, I think it is appropriate at this stage to state the law on this doctrine of *res judicata.*

In *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd.* [1995] 3 MLJ 189 his Lordship Peh Swee Chin FCJ had this to say: at p. 197:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per *rem judicatum*. When a matter between two parties had been adjudicated by a Court of competent jurisdiction,

the parties and their privies are not permitted to litigate once more the *res judicata,* because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur.* The public policy of the law is that, it is in the public interest that there should be finality in litigation – interest *rei publicae ut sit finis litium.* It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata,* but the earlier maxim has the further elevated status of a question of public policy.

Since a *res judicata* creates an estoppel per *rem judicatum,* the doctrine of *res judicata* is really the doctrine of estoppel per *rem judicatum,* the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say the *res judicata* is a rule of procedure and that an estoppel *per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.

And further down the judgment, his Lordship continued: at p. 198:

Thus, there are in fact two kinds of estoppel *per rem judicatum.* The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.

The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in Court for a particular remedy are determined in a final judgment and such right of action, ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is *res judicata*.

In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel per *rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence.

In respect of issue estoppel it was explained by the learned Judge in this way: at p. 199:

On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above;

the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in *Lawlor v. Gray* [1984] 3 All ER 345 at p. 350, who said: 'Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action.'

It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment.

There is one school of thought that issue estoppel applies only to issues actually decided by the Court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the Court, are still covered by the doctrine of *res judicata*, ie doctrine of estoppel per *rem judicatum.*

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata,* in other words, with the doctrine of estoppel per *rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the Courts being found always one step behind the resulting increase in litigation.

The doctrine of *res judicata* had also been stated succinctly by his Lordship Sharma J in *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74 as follows: at p. 76:

In *Satyadhyan Ghosel & Ors. v. Sint Deorajin Dobi and Anor.* AIR [1960] SC 941, the statement of the law on the subject is given thus:

> The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata,* it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter – whether on a question of fact or a question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in s. 11 of the Code of Civil Procedure; but even where s. 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of achieving finality

> in litigation. The result of this is that the original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.
>
> The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.
>
> A decision given by a Court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See: *Peareth v. Marriott* [1883] 22 Ch. D 182, *Hook v. Administrator-General of Bengal & Ors.* LR 48 IA 187 and *Re Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee and Anor*. [1936] MLJ 141 at pp. 147-151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See: *Louis Dreyfus v. Aruna Chalayya* LR 58 IA 381).

The above extract was duly approved and followed by the Court of Appeal in the case of *Hartecon JV Sdn. Bhd. & Anor. v. Hartela Contractors Ltd.* [1996] 2 MLJ 57. And his Lordship Gopal Sri Ram JCA gave the timely caution when he said: at p. 66:

> A failure to adhere to the principle expressed in the judgment of Sharama J just quoted may lead to chaos in the conduct of civil proceedings.
>
> ...
>
> ...
>
> ...
>
> We cannot over emphasize the proposition that once a Judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly. One may then ask: how is this approach to be reconciled with the decision in *Harrison* [1955] 1 Ch. 260.? The answer to that question lies in recognizing that the principle for which that case is authority applies only where it is demonstrated that the Court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests.

But arising from the foregoing a question may be asked: Is there any exception? In *Arnold v. National Westminster Bank* [1988] 3 All ER 977 Ch. D. Sir Nicolas Browne-Wilkinson V-C while considering the doctrine of issue estoppel which developed from the original form of *res judicata*, that is, cause

of action estoppel, (see: *Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd. & Ors.* (No. 2) [1966] 2 All ER 536 – the speech of Lord Guest at p. 564-5 and *Asia Commercial Finance (M) Bhd. (supra)*) expressed his view thus: at p. 980:

> I confess that, until Counsel for the lessees made his submissions in this case, I had thought that the doctrine of issue estoppel was an absolute one; although it might be difficult to decide whether or not the earlier decision did expressly or impliedly decide the very point sought to be litigated in the second action, once that had been demonstrated an issue estoppel necessarily arose. However, the authorities show clearly that from the first the doctrine has been expressed to be subject to exceptions.

And further down the judgment continued:

> It is therefore clearly established (and Counsel for the landlords accepts) that there can be exceptional circumstances which prevent an issue estoppel from arising. In my judgment it is equally clear that in order for such special circumstances to exist it must be shown either that the first decision is impeachable on the usual grounds (that is to say fraud, collusion, etc.) or that the first decision was a default judgment, or that relevant new material, not available at the time of the first decision, has since become available.

Such a view in fact was not without precedent although not as precise. In *Henderson v. Henderson* [1843-60] All ER 378 at p. 381-382, Wigram VC stated that "the plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Hence, as indicated, the rule as laid down was not taken to be absolute. In the case of *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* [1984] 30 MLJ 49 PC, an appeal from this country it was stated that "a much more restricted operation must be given to any estoppel arising from a default judgment." (See also: *Asia Commercial Finance (M) Bhd. (supra)*). Indeed in *Tong Lee Hwa & Anor. v. Lee Yoke San* [1979] 1 MLJ 24 FC it was required that the earlier judgment must "necessarily and with precision" determine the point in issue.

Thus, save in exceptional cases, the doctrine of *res judicata* applies where there has been a final decision "pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation" and that "any party or privy to such litigation as against any other party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits." (See: *Carl-Zeiss-Stiftung's* case *(supra)*). In short, the three essential elements of the doctrine are:

(i) there must exist a final judgment or decision;

(ii) there must be identity of parties. Those in privy are included; and

(iii) there must be an identity of subject matter or issue in the earlier and subsequent litigations. And this element is not confined to issues that were brought forward but to include issues which could have been taken up.

Having outlined the law involved, I now turn to the present appeal.

Basically on the main ground of appeal learned Counsel for the appellants/plaintiffs submitted that the doctrine of *res judicata* should not be applied in the instant case as the 1st decision was not a final judgment and that it was a nullity as well.

As regards the first reason, with respect, I find it has no merit. No doubt the 1st decision of the SCJ involved the striking out of the 1st action of the appellants/plaintiffs on the ground of it being statute-barred. But such a decision constitutes a final judgment. That was said so in the case of *Tio Chee Hing & Ors. v. Government of Sabah* [1982] 1 MLJ 138. His Lordship Wan Suleiman FJ at p. 139 said:

> Commencing with the decision of this Court in *Ratnam v. Cumarasamy & Anor*. ([1962] MLJ 330) the test applied by Lord Alverstone CJ in *Bozson v. Altrincham Urban District Council* ([1903] 1 KB 547), now known as the Bozson test has been preferred by our Courts to that applied in *Salaman v. Warner* ([1891] 1 QB 734) (the Salaman test). Put briefly the Bozson test is:
>
> > Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then it ought to be treated as a final order, but if it does not, then it is an interlocutory order.
>
> We can envisage nothing which disposes of the rights of the parties with more finality than a finding that an action is time-barred.

Thus, there was no basis to say that there was no final decision in the 1st action. There is also no question of the 1st action being merely struck out without any decision of the merits. The 1st decision had effectively demolished the cause of action of the appellants/plaintiffs. As such there was no longer any merit to determine.

The proper course should have been to appeal against the 1st decision. That was taken by the appellants/plaintiffs but failed on a technical ground. Nevertheless, as it was due to their own conduct that the appeal was struck out, they should not be heard now to say that they could recommence another action as they disagreed with the 1st decision. Otherwise there is nothing to

stop a third fresh action instead of appealing if they think an error of law has also been committed when deciding the instant case.

Similarly a *per incuriam* decision is not a nullity per se. An aggrieved party is at liberty to appeal to a higher Court. In the case of *Cassell & Co. Ltd. v. Broome* [1972] 1 All ER 801 HL where the Court of Appeal quite blatantly refused to follow an earlier decision of the House of Lords, there was no indication from the latter that the decision of former was a nullity. And I do not think the learned Counsel for the appellants/plaintiffs did honestly believe that a *per incuriam* decision should be considered a nullity. Otherwise he would not have appealed against the 1st decision.

Further, to say that the 1st decision is a nullity as it was based on a limitation period of two years instead of six years is also without any substance. Any error of law or misdirection on the law by a Court of the first instance having competent jurisdiction is a matter that should be dealt with on appeal.

Learned Counsel for the appellants/plaintiffs cited the case of *United Malayan Banking Corporation Bhd. v. Syarikat Perumahan Luas Sdn. Bhd. (No. 2)* [1988] 3 MLJ 352 to support his contention that where an order is a nullity there is no necessity to appeal. I think that is assuming that the 1st decision is a nullity. But having read that case it is my view that the facts and circumstances of these two cases are far apart. In that case the Court found the very basis of the action, i.e. the charge itself, was a nullity being in breach of the statutory prohibition expressed in the title deed imposed pursuant to s. 120 of the National Land Code. Thus any order made based on the charge would also be a nullity as "no Court is at liberty to enforce as valid, that which a statute has declared shall not be valid."

But in the present case there was no allegation of the Sessions Court lacking the jurisdiction when it struck out the 1st action. The appellants/plaintiffs were only contending that because the learned SCJ did not have the benefit of the earlier judgment of the High Court in Sarawak, the 1st decision should therefore be considered a nullity. With respect, this argument is along the same line as that of the *per incuriam* decision. I have already dealt with that point which should be equally applicable to the foregoing contention.

There was no dispute raised by the appellants/plaintiffs on the identity of the parties and the subject-matter in the 1st action and the 2nd action. And that should satisfy the two other elements necessary for the doctrine of *res judicata* to apply. In fact the two actions are identical in terms of the parties and the cause of action, that is, on negligence.

Accordingly, as I find that all the elements are present in relation to the doctrine of *res judicata*, there is therefore no basis to say that the learned SCJ erred in law in applying the doctrine when arriving at his 2nd decision.

And in coming to my conclusion I did consider whether the instant case could be within the exception rule of the doctrine. I was particularly aware of the decision in *Arnold & Ors*. case *(supra)*. There the learned Judge ruled that due to the subsequent change in the law thereby indicating that the earlier decision was wrong, such was considered as a sufficient reason to bring the case within the exception. But in that case the emphasis was on the subsequent change of the law since the previous decision.

In the present case there is no question of a subsequent change in the law. In fact learned Counsel for the appellants/plaintiffs contended that the 1st decision was *per incuriam*. Thus, I do not think the position of the instant case can be equated to that of *Arnold's* case *(supra)*. And it cannot be said that in refusing to consider this present case to be within the exception there is injustice done to the appellants/plaintiffs. The law as they perceived it was there for them to utilise right from the beginning. Further, they had the liberty to appeal, which they did, only to be struck out due to their own default. In my view they had all the avenues at their disposal. Hence, the issue of injustice upon them does not arise.

(b) Appeal And Limitation Period

Learned Counsel for the appellants/plaintiffs submitted that so long as the limitation period of the cause of action has not expired there is no mandatory requirement for his clients to appeal. In my view this submission is misplaced. The 2nd decision of the learned SCJ is basically on his application of the doctrine of *res judicata* to strike out the 2nd action. The main issue therefore is whether the learned SCJ was correct in doing so. And I have already dealt with that issue.

Thus, I do not think it will make any difference to the final outcome of this appeal even if this Court accepts the contention of the learned Counsel. The reason being that once it is affirmed that the learned SCJ applied the doctrine of *res judicata* correctly this appeal loses its basis. It is not a case of where the learned SCJ relied on several reasons to find the 2nd action scandalous, frivolous, vexatious and/or abuse of the process of the Court.

No doubt the learned SCJ in the course of his judgment did say that the appellants/plaintiffs should have pursued their appeal. But I do not find that comment to be one of his reasons in coming to his finding as he did. Hence, there is no substance to the above contention.

In any event it is my opinion that when a case has been determined, there is no basis for the aggrieved party to recommence a fresh action solely on the fact that his cause of action is yet to be statute-barred. Surely, this is when the doctrine of *res judicata* applies in its full rigour.

It was also the complaint of the appellants/plaintiffs that the learned SCJ erred in deciding that the 1st decision could be correct despite the decision of the High Court in Sarawak. Again it is my view that such a passing remark by the learned SCJ was not the deciding factor in striking out the 2nd action. Whether or not he was correct in the 1st decision is not an issue in this appeal. And as such I do not think it is necessary for me to make a finding as to which is the correct principle. For to do so would tantamount to considering the 1st decision which was in fact taken on appeal but was struck out. I should only be concerned with the 2nd decision.

Conclusion

For the reasons given hereinabove I therefore dismiss this appeal with costs.

Reported by Ling Hea Hoon